In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 618

CLIFFORD GOWDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The only question in this Federal Tort Claims Act suit is whether the court of appeals properly set aside as "clearly erroneous" the district court's findings that the government was negligent and that the petitioner was not contributorily negligent.

1. Petitioner brought this action for money damages against the United States under the Federal Tort Claims Act for injuries sustained when he fell eleven feet from the roof of a Coast Guard machinery house and fractured his heels. Petitioner was then working for Whittaker Electric Company,[1] an inde-

[1] Petitioner has received benefits under the Michigan Workmen's Compensation law. (T. App. 200a.)

pendent contractor, and was under the sole direction of his employer and not the United States (T. App. 131a–132a, 162a–163a, 175a, 304a–305a).[2] Petitioner was operating, in broad daylight, a small hand hoist to lift a steel door into place in the machinery house, as he had done a number of times before.

The hoist, supplied by petitioner's employer (T. App. 175a), was attached to a davit on the corner of the roof. Petitioner, instead of attaching the hoist to the davit by means of the available extension chain or "choker" (T. App. 179a–180a), so that the ratchet handle of the hoist could be safely operated from ground level or at least immediately in front of him, attached the hoist directly to the eye of the davit, which was so high above petitioner's head (10 to 12 feet above the roof) (T. App. 7a–8a) as to require him to pump the ratchet handle overhead while balancing precariously forward on the balls of his feet a foot from the edge of the roof (T. App. 176a). While so doing, he fell off the roof and was injured.

There was no dispute that extension chains or "chokers" were available (T. App. 179a–180a), and there was no evidence that petitioner used a safety belt or line, although he was experienced as a lineman working on poles (T. App. 161a, 180a). Petitioner admitted that he knew this to be a rooftop without a guardrail and that appropriate care would be required (T. App. 168a–169a).

Despite the foregoing evidence, the district court

[2] "T. App." refers to the transcript of pertinent portions of the testimony and depositions constituting the appendix in the court of appeals.

found that the government was negligent and that petitioner was not contributorily negligent, and entered judgment against the United States.

2. The court of appeals, upon reviewing the entire record, reversed the district court's findings as "clearly erroneous". The court of appeals noted that the ordinary dangers of working on a rooftop are neither hidden nor the subject of superior knowledge. It ruled that, even assuming that an un-railed rooftop was a dangerous instrumentality, as to which liability could be imposed on the owner without fault, under *Dalehite* v. *United States*, 346 U.S. 15, the United States would not be liable as mere owner of such property (346 U.S. at 45). The court also concluded that the United States had not been negligent, since the record established that its employees could not have foreseen such reckless conduct as that of petitioner (Pet. App. B. 75–89).

The court of appeals further held "clearly erroneous" the district court's additional finding that petitioner was not contributorily negligent. The court of appeals noted that petitioner had chosen a precarious balancing on the edge of the roof instead of the use of admittedly available extension chains (Pet. App. B. 89–91). The court further noted that "[i]t clearly appears that this work could have been done in a manner which would have avoided the injury, *e.g.*, by attaching the hoist-ratchet so that it could have been used at ground level, or even at waist level." (Pet. App. B. 90).[3]

[3] As petitioner recognizes (Pet. 27), the issue of admiralty jurisdiction need not be reached. It pertains primarily to the

In so holding, the court of appeals correctly applied Rule 52(a), F.R.Civ.P., and *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, in which this Court held that "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Moreover, since the decision below turns essentially on the particular facts and involves no conflict of circuits, further review is not warranted.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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question whether petitioner's contributory negligence would be a complete defense (under Michigan law) or whether it would be evaluated on a comparative basis (under Maritime Law). The decision of the court of appeals eliminated the question since that court held that: (1) the United States was not negligent, and (2) the negligence of petitioner caused his fall.

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